***United States Court of Appeals***

***for the Second Circuit***


# APPELLANT'S BRIEF

Orig w/affidavit of mailing

# 76-1251
# 76-1252

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P/S

*To be argued by*
CHARLES E. CLAYMAN

# United States Court of Appeals
## FOR THE SECOND CIRCUIT
**Docket Nos. 76-1251, 76-1252**

UNITED STATES OF AMERICA,
*Appellant,*

*—against—*

JOHN MAURO and JOHN FUSCO,
*Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

## BRIEF FOR THE APPELLANT


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UNITED STATES COURT OF APPEALS
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SECOND CIRCUIT

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**Docket Nos. 76-1251, 76-1252**

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UNITED STATES OF AMERICA,

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*Appellees.*

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## BRIEF FOR THE APPELLANT

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### Preliminary Statement

On this consolidated appeal, the United States appeals from two orders of the United States District Court for the Eastern District of New York (Bartels, *J.*), entered on May 17, 1976 and May 19, 1976 dismissing indictments against the defendants John Mauro and John Fusco for failure of the Government to comply with Article IV(e) of the Interstate Agreement on Detainers (Title 18, United States Code, Appendix).

Judge Bartels, in granting appellees' motions to dismiss the indictments, both of which charged criminal contempt in violation of 18 U.S.C. § 401, held that the Interstate Agreement on Detainers (hereinafter the "Agreement") requires dismissal, with prejudice, of outstanding federal charges whenever a federal defendant is returned to state custody without being tried on the

federal charges. The Government contends that where a state prisoner has been produced before a federal court pursuant to a writ of habeas corpus ad prosequendum issued under the explicit authority of 28 U.S.C. § 2241 (c)(5), the provisions of the Agreement are not invoked.

## Statement of the Case

On November 3, 1975, in separate indictments filed in the Eastern District of New York, the appellees John Mauro and John Fusco were charged with criminal contempt of court, in violation of 18 U.S.C. § 401. Both appellees had refused to testify before a Federal Grand Jury. At the time of these indictments, they were inmates in the custody of the State of New York serving sentences of three years to life and one year to life, respectively.

Pursuant to separate writs of habeas corpus ad prosequendum, issued November 5, 1975, each appellee was produced in the Eastern District of New York. These writs were issued under the authority of 28 U.S.C. § 2241(c)(5), which provides for the issuance of such a writ against a prisoner, state or federal, when "[i]t is necessary to bring him into court . . . for trial." On November 24, 1975, the appellees were arraigned before Judge Bartels on the respective indictments and both pleaded not guilty.

Mauro and Fusco next appeared in court on December 2, 1975, at which time Judge Bartels endeavored to set a trial date. The Government informed the court that it would be ready to try the cases fairly soon or in February (GA 67).[1] Mauro's counsel stated that he would be en-

[1] Unless otherwise indicated, references are to pages of the Government's appendix.

gaged in February and agreed to a March 17, 1976 trial date (GA 70). Fusco's counsel accepted a February 4, 1976 trial date, although this was later adjourned as a result of illness on the part of Judge Bartels (GA 110).

After setting the trial dates, the district court turned to the question of where Mauro and Fusco should be lodged while awaiting trial. Judge Bartels remarked that the Metropolitan Correctional Center ("MCC") was "overcrowded" and then said: "You can't stay here from December to March 17" (GA 70).[2] The Government agreed "to do whatever the court directed". The court then ordered the defendants returned to state custody stating: "Writ them down. You can leave them here a week and writ them down" (GA 70-71). Fusco had requested that he be allowed to return to State custody, and Mauro, while expressing a desire to remain at MCC, raised no objection to the court's ruling that he be permitted to remain only if there was room (GA 74). At no time did either Mauro or Fusco, both of whom were represented by experienced counsel, seek to invoke the provisions of the Agreement. Shortly thereafter they were both returned to State custody.

On March 2, 1976, a writ of habeas corpus ad prosequendum was issued for Fusco, and on April 14, 1976 a similar writ was issued for Mauro. Pursuant to these writs, they were produced in the Eastern District of New York on April 29, 1976 and April 26, 1976, respectively. Prior to this appearance each had moved, individually, for dismissal of their indictments on the ground that the Government failed to follow the procedures set forth in

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[2] The district court judge was addressing both Mauro and Fusco who had appeared before him at the same time. Obviously, however, the March 17 reference was relevant only to Mauro since trial had just been scheduled on that date. Fusco would have had to be returned in time for trial, which had just been scheduled for February 4.

Article IV(e) of the Agreement, that is, that they had been returned to custody without having been tried on the federal indictments.

On May 17, 1976 Judge Bartels ordered Fusco's and Mauro's respective indictments dismissed, holding that the Government had violated Article IV(e) of the Agreement when it returned defendants to state custody in December before trying them on the pending federal contempt charges and that, therefore, the Agreement required that the indictments be dismissed with prejudice.[3] In reaching this decision, Judge Bartels determined that the Agreement bound the federal government as both a sending State and receiving State for prisoners. Furthermore, the court held that even though the federal government employed a writ of habeas corpus ad prosequendum

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[3] "Article II

"As used in this agreement:

"(a) 'State' shall mean a State of the United States; the United States of America; a territory or possession of the United States; the District of Columbia; the Commonwealth of Puerto Rico.

"(b) 'Sending State' shall mean a State in which a prisoner is incarcerated at the time that he initiates a request for final disposition pursuant to article III hereof or at the time that a request for custody or availability is initiated pursuant to article IV hereof.

"(c) 'Receiving State' shall mean the State in which trial is to be had on an indictment, information, or complaint pursuant to article III or article IV hereof.

"Article IV

"(e) If trial is not had on any indictment, information, or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to article V(e) hereof, such indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice." (18 U.S.C. Appendix).

rather than filing a detainer as required by the Agreement, the Agreement is "the exclusive means" for securing the presence of a state prisoner for purposes of federal prosecution. Thus, the district court determined that the provisions and sanctions of the Agreement should be applied. In effect, the court held that the Agreement, when available, had, by implication, repealed the 28 U.S.C. § 2241(c)(5) writ of habeas corpus ad prosequendum.[4]

## ARGUMENT

### The Interstate Agreement on Detainers Is Not the Sole Authority Under Which the Federal Courts May Obtain State Prisoners for Trial and Its Provisions Do Not Apply to Writs of Habeas Corpus Ad Prosequendum Issued Pursuant to 28 U.S.C. § 2241(c)(5).

### A. Introduction

The district court's holding that a writ of habeas corpus ad prosequendum issued pursuant to 28 U.S.C. § 2241(c)(5) should be treated as a detainer under the Agreement with the resulting application of the Agreement's provisions and sanctions is, in effect, a holding that the Agreement is the sole means by which the federal courts may obtain state prisoners for trials. Indeed, by this holding, the district court has determined that the traditional and time-honored writ of habeas corpus ad prosequendum no longer exists except as it may constitute a detainer under the Agreement.

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[4] Of course, this holding is conditioned on a finding that the particular state has adopted the agreement. New York has done so. N.Y. Crim. Proc. L., § 580.20.

Thus, for all practical purposes, the district court has held that the Agreement, when available, impliedly repeals § 2241(c)(5). The Government submits that the district court decision is incorrect and there has been, erroneously, judicial legislation withdrawing from the federal statutory scheme a "necessary tool for jurisdictional potency as well as administrative efficiency . . ." *Carbo* v. *United States*, 364 U.S. 611, 618 (1961).

## B. The Writ of Habeas Corpus Ad Prosequendum

It is instructive to turn, initially, to a history of the writ of habeas corpus ad prosequendum to determine if the Congressional enactment into law of the Agreement should be considered, without express recognition in the pertinent legislative history, to have impliedly repealed this writ.

In an opinion by Chief Justice Marshall, the Supreme Court, in *Ex parte Burford*, 7 U.S. (3 Cranch) 448, 449 (1806), recognized that the term of "habeas corpus", as used in the 1789 Judiciary Act, 1 Stat 81-82 (1789), was a generic term and included the writ of habeas corpus ad prosequendum. *See also Price* v. *Johnson*, 334 U.S. 266, 281 (1948). One year later, in *Ex parte Bollman* (*Ex parte Swartwout*), 8 U.S. (4 Cranch) 75, 95-98 (1807), the Chief Justice held, in accord with the English practice, that the writ ad prosequendum was *necessary* to remove a prisoner in order to prosecute him in the proper jurisdiction. The Court found authority for such writs in the reference to habeas corpus contained in the first sentence of § 14 of the Judiciary Act.[5]

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[5] This sentence gave authority to "all the courts of the United States . . . to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute . . ." 1 Stat. 81 (1789).

A series of amendments dealing with habeas corpus followed the Judiciary Act of 1789. Relevant to this appeal was the 1875 amendment, Revised Statute Section 751 (1878), which, as the lineal derivative of the first sentence of § 14 of the Act, served as a modern version of the authority for writs ad prosequendum upon which Justice Marshall had relied in *Ex parte Bollman*. *See Carbo* v. *United States*, *supra*, at 616. Section 2241 took its present form in 1948 with explicit provision for the writ of habeas corpus ad prosequendum in subparagraph (c)(5).

Due to the supremacy of federal law, federal courts have the power to issue a writ of habeas corpus compelling the release of a prisoner from state custody. *Cunningham* v. *Neagle*, 135 U.S. 1 (1890); *Boske* v. *Comingore*, 177 U.S. 459 (1900). State courts, however, cannot compel the corresponding release of a person who is held in federal custody. *See Ableman* v. *Booth*, 62 U.S. (21 How.) 506 (1858); *cf.* 18 U.S.C. 4085. Thus, prior to the enactment of the Agreement, in order to obtain federal prisoners for trial on an outstanding state charge, formal extradition procedures were required. Additionally, since writs of habeas corpus were not recognized between states, extradition was also necessary for one state to obtain a prisoner from another state. *See Kentucky* v. *Dennison*, 65 U.S. (24 How.) 66 (1860).

## C. The Agreement

The Agreement was designed to facilitate the transfer of prisoners between the states. However, it appears that federal participation was not sought until the Supreme Court decided *Smith* v. *Hooey*, 393 U.S. 374 (1969).

In the *Smith* case, the Court held that the Sixth Amendment right to a speedy trial applies, even in a

case where the state could not compel the presence of a federal prisoner being detained in a federal institution. Because of this decision it quickly became apparent that there was needed a procedure to rectify the situation. A legal basis was necessary to recognize state requests for the custody of federal prisoners. This is clearly stated in Section 2, Article I, Interstate Agreement on Detainers Act. *See also* the letter of the Deputy Attorney General of the United States to the Chairman of the House Judiciary Committee:

> "Last term the Supreme Court ruled that prisoners charged with State offenses have a right to speedy trial and that the State is under an obligation to make a 'diligent, good faith effort' to bring a defendant to trial within a reasonable time, even though he is serving a sentence of imprisonment in a Federal prison outside the State. *Smith* v. *Hooey*, 89 S.Ct. 575, 393 U.S. 374, 21 L.Ed. 2d 607 (1968). As a result of this case, a number of States are requesting production of Federal prisoners. While some States have offered to provide the local police authorities to transport the Federal prisoners to the jurisdiction in which State charges are pending, at the present time this procedure is not feasible because the Federal term must run uninterruptedly, and therefore the prisoner must remain in the custody of a Federal official. This means that prisoners are returned to the State for trial in the custody of a U.S. marshal and arrangements must be made for Federal payment for the prisoner's lodging in an approved State jail with reimbursement by the State for the expenses involved. Article V of the Agreement provides that the appropriate authority in the receiving State could be entitled to temporary custody and that during the continuance of temporary custody time being served

> on the sentence shall continue to run. (Article V(a) and (f).)" (1970 U.S. Code Cong. & Admin. News, 4867, 4868.)

It is significant that the Department of Justice, in the above-quoted letter of the Deputy Attorney General, endorsed the Agreement in large part because of the number of states requesting production of federal prisoners. Since federal custody of state prisoners for disposition of federal detainers is routinely obtained by removal and transfer anywhere within the United States by use of the writ of habeas corpus ad prosequendum, issued under 28 U.S.C. § 2241(c)(5), there was no corresponding United States need for such an Agreement. The United States would continue to utilize the § 2241 (c)(5) writ of habeas corpus ad prosequendum. *See United States* v. *Carbo*, *supra*.

The Senate Report, 1970 U.S. Code Cong. & Admin. Laws, 4864, shows that Congress, in adopting the Agreement, was aware of and approved the idea of providing an avenue by which federal inmates could initiate the speedy disposition of their outstanding state detainers and of permitting federal custody to run even when the states paid for that custody.[6] The purposes of the Agreement, as well as all other references to the future par-

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[6] In the section entitled "Need for the Legislation", the Senate Report states an additional reason for adopting the Agreement:

> "Although a majority of detainers filed by States are withdrawn near the conclusion of the Federal sentence, the damage to the rehabilitation program has been done because the institution staff has not had sufficient time to develop a sound pre-release program." (1970 U.S. Code Cong. & Admin. News, 4866).

This reason is, however, of secondary importance. The main impetus to adoption of the Agreement was the *Smith* v. *Hooey* case, *supra*.

ticipation of the United States in the Agreement's legislative history, therefore, uniformly cast the United States in the role of a sending, and not a receiving State. *See* Senate Report, *supra*, at 4864-69.

Indeed, it is significant that the portion of the Senate Report, entitled "Impact and Cost", *id.* at 4867, considers only the effect of the Agreement on State detainers lodged against federal prisoners where the United States would become the sending State. There is no suggestion that the United States would ever be a receiving State. Certainly, this denotes a Congressional recognition of the continued viability of the writ of habeas corpus ad prosequendum as the means by which the federal government would obtain state prisoners for trial. *Accord*, Report of the Committee on the Administration of the Criminal Law to the Judical Conference of the United States, February 1968, Agenda D-11, page 6; Eugene Barkin, *Impact of Changing Law Upon Prison Policy*, 48 Prison J. 310 (1968).

Although the United States is denominated a "state" by Article II of the Agreement, and thus would seem to be a "receiving state" within Article III, "(i)t is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within the spirit, nor within the intention of its makers." *Church of the Holy Trinity* v. *United States*, 143 U.S. 457, 459 (1892); *see also Muniz* v. *Hoffman*, 422 U.S. 454, 469 (1975).

As Judge Learned Hand observed, "[t]here is no surer guide in the interpretation of a statute than its purpose when that is sufficiently disclosed; nor any surer mark for over solicitude for the letter than to wince at carrying out that purpose because the words used do not formally quite match with it." *Federal Deposit Insur-*

*ance Corp.* v. *Tremaine*, 133 F.2d 827, 830 (2d Cir. 1943). Judge Bartels was cognizant of this principle (GA 19) but ruled that the Congress had not manifested a desire to limit the role of the United States to that of a "sending state". The Government submits that this is incorrect and that the spirit and intent of Congress has been "sufficiently disclosed" in this regard to establish that the United States is a sending, but not receiving, state under the Agreement and that the Agreement has not replaced the writ of habeas corpus ad prosequendum.

Congressional intent is further illuminated by the purposed Criminal Justice Reform Act of 1975 (S-1), Section 3201(a), whch provides, in part:

> "(a) Adoption of Agreement by the United States --The United States solely as a 'sending state', and the District of Columbia are parties to the Interstate Agreement on Detainers. . ."

Ths Senate Committee on the Judiciary Report on S-1 states that Section 3201 the existing enabling act of the Agreement:

> "has been amended to clarify the intent of Congress by providing that the Federal Government is a participant in the Agreement only in the capacity of sending state. Federal prosecution authorities and all Federal defendants have always had and continue to have recourse to a speedy trial in a Federal court pursuant to 28 U.S.C. 2241(c)(5), the Federal writ of *habeas corpus ad prosequendum*. The Committee does not intend, nor does it believe that the Congress in enacting the Agreement in 1970 intended, to limit the scope and applicability of that writ".

We disagree with Judge Bartels' opinion that this proposed section and the Senate Report do not accurately

reflect the Congressional intent as it existed at the time of the 1970 enactment of the Agreement (GA 18). It is important to note that of the fifteen present members of the Judiciary Committee, twelve were also members of the Committee in 1970, when their first report on the Agreement was issued (Senate Report 91-1356). Thus, their expression of original Congressional intent, that the federal government participate in the Agreement only as a sending State and that the Agreement not supplant the writ of habeas corpus ad prosequendum, should be given great weight.[7]

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[7] The Speedy Trial Act of 1974, 18 U.S.C. § 1361 *et seq.*, was enacted after the adoption of the Agreement and is helpful in further revealing what Congress intended. Subsection (j) of Section 3161 of the Speedy Trial Act provides:

> "(1) If the attorney for the Government knows that a person charged with an offense is serving a term of imprisonment in any penal institution, he shall promptly—
> "(A) undertake to obtain the presence of the prisoner for trial; or
> "(B) cause a detainer to be filed with the person having custody of the prisoner and request him to so advise the prisoner and to advise the prisoner of his right to demand trial.
> "(2) If the person having custody of such prisoner receives a detainer, he shall promptly advise the prisoner of the charge and of the prisoner's right to demand trial. If at any time thereafter the prisoner informs the person having custody that he does demand trial, such person shall cause notice to that effect to be sent promptly to the attorney for the Government who caused the detainer to be filed.
> "(3) Upon receipt of such notice, the attorney for the Government shall promptly seek to obtain the presence of the prisoner for trial.
> "(4) When the person having custody of the prisoner receives from the attorney for the Government a properly supported request for temporary custody of such prisoner for trial, the prisoner shall be made available to that

[Footnote continued on following page]

Furthermore, in holding that the writ of habeas corpus ad prosequendum was in effect supplanted by the Agreement, the district court disregarded a fundamental rule of statutory construction. Where the Congress has expressly legislated concerning a particular subject matter, this express legislation should not be deemed to be implicitly repealed by subsequent legislation, especially where the subsequent legislation is not even concerned with the identical subject matter. *Rosencrans* v. *United States*, 165 U.S. 257 (1897). Instead, the court must reconcile the conflicting legislation, if at all possible. *McCool* v. *Smith*, 66 U.S. (1 Black) 459 (1861); *Furman* v. *Nichol*, 75 U.S. (8 Wall) 44 (1868). Thus, the express provision for a writ of habeas corpus ad prosequendum which appears in § 2241(c)(5) cannot be held to have been repealed by the Agreement, as the district court held.

Moreover, the Agreement should be construed to eliminate conflict with § 2241(c)(5). This may be achieved by holding that when federal removal and transfer is necessary to dispose of an outstanding *federal detainer*, the federal writ of habeas corpus ad prosequendum applies. However, on the other hand, when a State requests the production of a federal prisoner to dispose of an outstanding *state detainer*, the Agreement applies.

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attorney for the Government (subject, in cases of interjurisdictional transfer, to any right of the prisoner to contest the legality of his delivery)."

Although Congress had adopted the Agreement only a few years earlier, it indicated in the Speedy Trial Act that there are no prescribed means by which the federal government must obtain a prisoner, but only that the prisoner should be obtained. This strongly suggests that the writ of habeas corpus ad prosequendum remains available to the federal government as an alternative to the filing of a detainer under the Agreement.

Indeed, to construe the Agreement as rendering the § 2241(c)(5) writ of habeas corpus ad prosequendum the functional equivalent of a detainer under Section 2, Article III(a) of the Agreement would in practical effect reduce the judicial writ of habeas corpus to no more than a nonjudicial administrative detainer. This result would be compelled by the very language of the Agreement itself, which provides that "the Governor of the sending State may disapprove the request for temporary custody or availability" (Article IV[a]); a refusal which is not susceptible of further review. This lack of enforceability is contrary to the result that normally obtains in connection with a writ of habeas corpus, 18 U.S.C. § 401(3); *cf. In re an Order Authorizing the Use of a Pen Register*, — F.2d — (2d Cir. Slip op. 4903, 4914, July 13, 1976). Moreover, the very language of this provision excludes the United States from availing itself of this option. Therefore, it would strain recognized principles of statutory construction to conclude that Congress intended the Agreement to abrogate the § 2241(c)(5) writ of habeas corpus ad prosequendum.

In holding that the Agreement is now the exclusive means by which the federal government can obtain the temporary custody of a State prisoner, the district court relied on the case of *United States ex. rel Esola* v. *Groomes*, 520 F.2d 830, 836-837 (3rd Cir. 1975). *Groomes*, however, concerned the transfer of a federal prisoner confined at the Federal Correctional Institution, Danbury, Connecticut, to the temporary custody of New Jersey, the receiving State. After having been transferred four times between Danbury FCI and New Jersey, Esola was tried and convicted in New Jersey. Following exhaustion of his state remedies, Esola brought a § 2254(b) petition to have his state conviction voided on the ground that New Jersey had violated the terms of the Agreement. The District Court dismissed the petition. The Third Circuit

reversed and remanded, stating that "we decide no more in this case than that a cause of action is stated by the apparent failure of New Jersey to comply with the terms of the Agreement" *Id.* at p. 839.

Thus, the holding in *Groomes* "that the Agreement provides the exclusive means of transfer when it is available" must be read in context. The case concerned the transfer of a *federal* prisoner to state custody and an intervening return to the federal sending jurisdiction before he was tried in the state court. There is no analysis relating to the converse situation: the transfer of a *state* prisoner to federal custody with an intervening return to the state jurisdiction before trial in the federal court. Accordingly, the court's reliance on *Groomes* is misplaced. And *United States* v. *Ricketson*, 498 F.2d 367 (7th Cir. 1968), *cert. denied*, 419 U.S. 965 (1974), also cited by the court, is not supportive of the decision below. The *Ricketson* Court explicitly held that it "need not decide whether the Agreement is exclusive when it applies". *Id.* at 373. Indeed, the Court, in *Ricketson*, held that the "Agreement [was] inapplicable". *Ibid. But see, People* v. *Bernstein*, 344 N.Y.S. 2d 786 (Dutchess County Court, 1973) where the court held that the sanctions of the Agreement only come into play when the prisoner, who has been returned to the sending state before trial in the receiving state, was himself ready for trial at the time he is brought into court. The court held that a strict construction of the Agreement is "impractical and unduly harsh [and] this literal interpretation would limit the appearance of defendants in State courts for the purpose of pre-trial motions and procedures." *Id.* at pp. 787-788.

Indeed, a result similar to *Bernstein* is appropriate in this case, where the writ of habeas corpus ad prosequendum, and not the Agreement, was issued to bring the defendants before the district court for the purpose of arraignment and the setting of a trial date. The provi-

sions of the Agreement were never invoked by the Government, the defendants or the court. To the contrary, the proceedings of December 2, 1975 demonstrate that the appellees were not produced in the Eastern District under the Agreement. *Cf. United States* v. *Ricketson*, *supra* at 373.

After setting trial dates, the district court inquired as to where the defendants were to be kept before trial and remarked "you can't stay [here] from December to March 17 . . . It's overcrowded". The prosecutor agreed to do whatever the court desired. No objections were raised to the court's ruling by Mr. Mauro or Mr. Fusco, and in fact Mr. Fusco requested that he be returned to the state prison (G.A. 70-74).[8] Mr. Mauro expressed a desire to remain, only if the warden had no objection (G.A. 74). The Court then ruled that they would stay only if the warden agreed, and Mauro consented to this ruling.

Finally, it is plain that the purposes of the Agreement are not served by a literal reading of its provisions. For instance, had one of the defendants below been incarcerated in a state not party to the Agreement,[9] that de-

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[8] When the Government complied with his request, he complained that he had been returned to his sending institution without having been tried, a violation of the Agreement. On this basis, his indictment was dismissed. The Government contends that Fusco should have been estopped from asserting such a claim in these circumstances. He should not be permitted to exploit his return to his sending institution, because it was primarily attributable to his own request and consent. *Compare United States* v. *Lustman*, 258 F.2d 475 (2d Cir.), *cert. denied*, 358 U.S. 880 (1958). Similarly, appellee Mauro's consent to his return should have estopped him from seeking a dismissal of his indictment. *See also, People* v. *Bernstein*, *supra* at 787: "This defendant cannot take advantage of his own actions."

[9] According to information supplied by the Council of State Governments, these states presently include Alabama, Alaska, Mississippi, and Oklahoma.

fendant would not have been able to obtain dismissal of his indictment even had he been returned to his sending institution after his arraignment. But, his co-defendant, treated in exactly the same manner by the federal government, would be permitted to escape trial on the indictment because, if the decision below is considered to be correct, the provisions of the Agreement were violated. This inequitable result would make a mockery of federal legislation designed to achieve uniform application of the law.

Therefore, if the decision below is upheld, it would mean that the Congressional adoption of the Agreement has repealed 28 U.S.C. § 2241(c)(5); has arbitrarily discriminated against prisoners held in custody by non-party states; and has granted authority to the governors of the party states to defeat lawful federal process. There is no support for these drastic changes in the delicate federal-state relationship in the Agreement itself or the legislative history. On the contrary, as the Senate Report makes clear, the Agreement was not intended to affect the writ of habeas corpus ad prosequendum issued under the authority of § 2241(c)(5).

## CONCLUSION

**The Orders of the District Court should be reversed.**

Dated: July 26, 1976

Respectfully submitted,

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*United States Attorney,*
*Eastern District of New York.*

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[10] The United States Attorney's Office wishes to acknowledge the invaluable assistance of John A. Records in the preparation of this brief. Mr. Records is a third year law student at the New York University School of Law.

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# AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

EVELYN COHEN, being duly sworn, says that on the 29th day of July, 1976, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, ( v and State of New York, a BRIEF FOR THE APPELLANT of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

| | |
|---|---|
| John C. Corbett, Esq. | Robert Sadowski, Esq. |
| 66 Court Street | 125-10 Queens Blvd. |
| Brooklyn, N.Y. 11201 | Kew Gardens, N.Y. 11415 |

Evelyn Cohen

Sworn to before me this
29th day of July, 1976

Olga S. Morgan

OLGA S. MORGAN
Notary Public, State of New York
No. 24-4501966
Qualified in Kings County
Commission Expires March 30, 1977